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Wheelchair Participation in Road Racing: A Right Not a Privilege

David Carico

Wheelchair Participation in Road Racing:[1] A Right, Not a Privilege

One reason most of us become runners is that we prefer relying on ourselves.[2]

The past decade has witnessed a substantial increase in the number of individuals participating in amateur athletics. Probably the best example of this phenomenon has been the jogging craze that began in the 1970's. Increasing numbers of men, women and children, old and young alike, have taken up running to obtain the physical,[3] psychological,[4] and social[5] benefits of the sport.

Less well known, but equally widespread, has been the precipitous rise in the number of *physically disabled* individuals competing in wheelchair athletics.[6] The wheelchair sports movement had its origin in the many permanently disabled young veterans of World War II who populated this nation's Veterans Administration hospitals in the

1. The term "road racing" will be used as a synonym for marathoning and other running races conducted on public streets. The "marathon" is the pinnacle of all road races. The word probably had its origin in the time of the ancient Greeks. The Persian landings at Marathon in 490 B.C. prompted the defending Athenians to dispatch Pheidippides, "a professional long-distance runner," from Athens to Sparta (a distance of about 140 miles) to seek help from the Spartan government. *See* HERODOTUS, THE HISTORIES, BOOK VI 425 (De Selincourt ed. and tr. 1965). Pheidippides "reached Sparta the day after he left Athens." *Id.* The marathon as a form of racing is of modern origin, dating from 1896. *See* Response to Petition for Hearing at 10, New York Roadrunners Club v. Division of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981). The word "marathon" usually connotes a 26-mile, 385-yard running race.

2. THE RUNNER, Feb. 1982, at 50 (quotation by Bill Rodgers, currently the fifth ranked male road racer). Rodgers has the seventh fastest marathon time ever recorded. THE RUNNER, Jan. 1982, at 80. J. FIXX, THE COMPLETE RUNNER'S DAY-BY-DAY LOG AND CALENDAR (quote from week of Jan. 18-24 94th ed. 1982) [hereinafter cited as FIXX].

3. Running and other forms of aerobic exercise have been shown to bring about a number of beneficial cardiovascular changes that include a lower pulse rate, increased mechanical efficiency of the heart and protection from heart disease. *See* J. FARQUHAR, THE AMERICAN WAY OF LIFE NEED NOT BE HAZARDOUS TO YOUR HEALTH 83-84 (1978).

4. Running has been shown to reduce stress. *Id.* One study has shown that regular running reduced the levels of aggressive behavior in emotionally disturbed children. *See* Barnes, *Child's Play Proving that Running Can Help Emotionally Disturbed Kids*, THE RUNNER, Feb. 1982, at 16.

5. Increasingly, athletics has become a dominant factor in the socialization process. According to one source:

> Sport permeates any number of levels of contemporary society and it touches upon and deeply influences such disparate elements as status, race relations . . . the concept of the hero . . . ethical values. For better or worse, it gives form and substance to much in American life.

R. BOYLE, SPORT: MIRROR OF AMERICAN LIFE 3-4 (1963).

6. The California Wheelchair Athletic Association (hereinafter referred to as the C.W.A.A.) has 260 members who compete in the following sports: track and field, table tennis, tennis, weightlifting, archery, road racing, basketball and bowling.

late 1940's.[7] These individuals invented the sport of wheelchair basketball and initiated the organization of the sport in community settings.[8]

The phenomenon of mass participation in organized road racing has not gone unnoticed by the wheelchair population, which has participated alongside of able-bodied athletes in numerous races.[9] The evolution of wheelchair road racing has shown that the training demands of wheelchair sports are comparable to those required of the able-bodied athlete.[10] Wheelchair athletes, like their ambulatory counterparts, undergo rigorous training to prepare for road racing events, thereby experiencing the same psychological and physical benefits that accrue to non-disabled athletes from a daily training regimen. Their training demands and desire for competition, similarly extend year-round;[11] however, the limited number of competitions that are currently provided for disabled athletes is inadequate to meet the increasing demand for organized athletic competition.[12]

Coterminous with the growing number of wheelchair athletes desiring to participate in running events is the increasing number of instances when their participation is denied by individual race directors. Recently litigation has resulted in New York concerning the decision of

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7. *See* NATIONAL WHEELCHAIR ATHLETIC COMMITTEE, WHEELCHAIR ATHLETES AND ROAD RACES—A POSITION PAPER 1 (1980) [hereinafter cited as POSITION PAPER].

8. *Id.* The subsequent development of wheelchair sports in Europe and elsewhere has made the goal of increasing available athletic opportunities for the disabled a universal movement. In the United States, the Special Olympics for the handicapped has been the most widely supported organized athletic event for *school-age* children.

9. See notes 110-111 and accompanying text *infra*.

10. This point was established by Bob Hall of Boston, Massachusetts, who trained for the 1975 Boston Marathon by

> pushing [his wheelchair] a ten (10) mile distance daily, [and] was later able to distinguish himself by finishing the 26 mile 385 yard distance in well under the three hour limit which qualified him for receipt of a certificate from the organizing committee acknowledging this feat.

POSITION PAPER, *supra* note 7, at 1. The long-range consequence of Hall's performance was to popularize the sport among wheelchair athletes, leading to their increased participation in long-distance running. *See* POSITION PAPER, *supra* note 7, at 1.

11. The extension of the wheelchair sports movement to include long-distance and short-distance road racing has provided wheelchair athletes with a readily available source of exercise and competition in an organized setting. Wheelchair participation in road racing has increased steadily, in part because of the present paucity of other oganized athletic events available to the physically disabled. Currently, two organizations, the National Wheelchair Athletic Association (hereinafter referred to as N.W.A.A.) and the National Wheelchair Basketball Association (hereinafter referred to as N.W.B.A.), comprise the entire structure of organized wheelchair athletics in the United States. These two organizations have been unable to meet the current demand for organized wheelchair athletic competition for the reason that the number of physically disabled persons in the United States wanting to engage in some form of organized competition is simply too large. In California alone there are approximately one and a half million disabled persons between the ages of 16 and 64. The term "disabled," in the California Disability Survey, refers to persons who are limited in their performance of major social roles by enduring physical and/or mental impairments. *See* CALIFORNIA DEPARTMENT OF REHABILITATION, EXECUTIVE SUMMARY FOR THE CALIFORNIA DISABILITY SURVEY 3 (1980) [hereinafter referred to as DISABILITY SURVEY]. Thirty-eight percent of these individuals are limited in walking. *Id.* at Table ES-8.

12. See note 11 *supra*.

the race director[13] to prevent wheelchair athletes from competing in the annual New York City Marathon, a privately-operated competition and the largest marathon road race in the United States.[14] In *New York Roadrunner's Club v. State Division of Human Rights*[15] the New York Court of Appeals upheld the exclusion of wheelchair participation from the New York City Marathon. Similar discrimination against wheelchair athletes by race directors in California would result in the exclusion of a large percentage of the physically disabled population of the United States from an otherwise readily available form of physical activity and competition.[16] The decisions of private race directors to exclude qualified wheelchair athletes cannot be reconciled with existing federal and state constitutional and statutory guarantees prohibiting discrimination against handicapped[17] individuals.

One of these guarantees is Section 504 of the Rehabilitation Act of 1973.[18] This section prohibits discrimination against "qualified" handicapped persons[19] participating in programs receiving "federal financial assistance."[20] This comment will demonstrate that Section 504 applies to road racing conducted on public streets. In addition, the comment will show that the exclusion of wheelchair participation in road racing violates both state and federal equal protection guarantees, as well as California Civil Code sections 54 and 54.1 entitling handicapped persons to full and equal access to places to which the general public is invited.[21] Finally, it will be demonstrated that an attempt to judicially enforce the right to participate under existing law, while a useful interim approach, will produce inconsistent results due to uncertainty in the application of the law. Moreover, the adoption of a case-by-case

13. The decision to exclude wheelchair participation was contrary to the wishes of the Mayor of New York. *See* Mayor Edward I. Koch, Press Release, No. 324, October 14, 1978.

14. In 1980 there were some 16,000 entrants: 1,103 were fifty and older and nineteen were over seventy years of age. *See* FIXX, *supra* note 2 (introductory paragraph to month of August).

15. 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981) (cited here with particular reference to the appellate court opinion).

16. There are an estimated 3.4 million handicapped, noninstitutionalized persons living throughout the nation. *See* CALIFORNIA STATE PLAN FOR DEVELOPMENT DISABILITIES SERVICES FOR THE FISCAL YEAR 1981 §2 at 5. In California, as of 1980, there were approximately one and one-half million disabled persons between the ages of 16 and 64 in the civilian household population. *See* DISABILITY SURVEY, *supra* note 11, at 2.

17. A handicapped person, for the purpose of applying the federal anti-discrimination statute, section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794 (1976) [hereinafter cited as Rehabilitation Act], is defined as "any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 45 C.F.R. §84.3(j) (1980). The Code of Federal Regulations defines "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. *Id.* §84.3(2)(ii).

18. 29 U.S.C. §794 (1976).

19. See notes 66-93 and accompanying text *infra*.

20. See notes 23-40 and accompanying text *infra*.

21. CAL. CIV. CODE §§ 54, 54.1.

approach by the courts in providing a remedy for discrimination against handicapped athletes in road racing would not serve adequately the interests of wheelchair participants, who desire greater standardization of procedures for their participation in road races.[22]

This comment will first discuss the necessary requirements for imposing liability under the Federal Rehabilitation Act of 1973, and then apply those standards to wheelchair participation in road racing to determine if liability should be imposed on the discriminatory conduct of race directors.

A Federal Statutory Guarantee of the Right to Participate

Section 504 of the Rehabilitation Act of 1973[23] provides that qualified handicapped persons may not be discriminated against in any federally funded program or service, whether public or private.[24] Specifically, the statute states that

> [n]o otherwise qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity that receives or benefits from federal financial assistance.[25]

The application of the statutory prohibition of section 504 to road racing events conducted on public streets hinges on the statutory and judicial interpretations of the terms "receiving federal financial assistance" and "otherwise qualified handicapped person."

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22. Telephone interview with Phil Carpenter, President of the International Wheelchair Athletic Association [hereinafter referred to as I.W.A.A.], January 7, 1982 (notes on file at the *Pacific Law Journal*) [hereinafter cited as Phone Conversation with Phil Carpenter].

23. 29 U.S.C. §794 (1976).

24. *Id.*

25. 45 C.F.R. §84.4(a) (1981). California has a similar statute that prohibits discrimination against qualified persons with developmental disabilities under any program or activity that receives public funds. California Welfare and Institutions Code Section 4502 states that

> no otherwise qualified person by reason of having a developmental disability shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, which receives public funds.

The term "developmental disability" is defined in the California Welfare and Institutions Code Section 4512(a) to include any

> disability [which] originates before an individual attains age 18, continues, or can be expected to continue, indefinitely, and constitutes a substantial handicap for such individual. . . . [T]his term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

In most situations the California statute would not apply to wheelchair athletes seeking to participate in road racing, for their disabilities are usually only physical in nature.

A. Liability under Section 504

This section will discuss the three essential requirements for imposing liability under section 504 and determine whether those requirements are met with respect to discrimination against wheelchair athletes in road racing. Liability under section 504 is imposed on any public or private person or entity that discriminates against handicapped individuals if that person or entity is (1) receiving or benefitting from federal financial assistance; (2) discriminating against handicapped individuals that are "qualified" to participate in the program or activity under question; and, (3) failing to make the program "accessible" to handicapped persons.

1. Defining the Term, "Receiving Federal Financial Assistance"

The term "receiving federal financial assistance" has been given a broad interpretation both in the section 504 regulations[26] promulgated by the Department of Health and Human Services (hereinafter D.H.H.S.) and in judicial opinions.[27] The term is defined in federal regulations to include:

> any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the [federal agency] provides or otherwise makes available assistance in the form of (1) funds; (2) services of federal personnel; or (3) real and personal property . . . .[28]

There is no doubt that the State of California and its political subdivisions receive a substantial amount of federal funding for economic and social programs,[29] including general assistance for state programs[30] and federal grants for specific projects like highway construction and improvements.[31] In order to impose liability on a public or private entity that does not receive federal funding directly, however, it is necessary to determine the scope of the term "receiving federal financial assist-

26. *See* 45 C.F.R. App. A, pt. 84, No. 2 (1980). The Secretary of Health, Education and Welfare [hereinafter referred to as H.E.W.] stated that institutions receiving Medicaid funds are considered "recipients" of federal financial assistance. *Id.*

27. A vast majority of the decisions tend to support the notion that the use of *any* federal money in an institution, is sufficient to establish the receipt of federal funds for the purpose of applying Section 504. The requirements are somewhat more stringent in determining whether the receipt of federal funding is sufficient to qualify the recipient as a federal or state actor. *See* 5 MENTAL DISABILITY L. REP. 141 (1981). The United States Supreme Court, in *Norwood v. Harrison*, 413 U.S. 455 (1975) indicated that it would find state action in the receipt of federal funds when there is "tangible financial aid . . . that . . . has a significant tendency to facilitate, reinforce and support private discrimination." *Id.* at 466.

28. 45 C.F.R. §84.3(h) (1980).

29. See notes 49-53 and accompanying text *infra*.

30. See note 54 and accompanying text *infra*.

31. See notes 49-51 and accompanying text *infra*.

ance." The first element in this determination is whether a person or entity qualifies as a recipient of federal funds.

A "recipient" of federal financial assistance is defined to include any private persons or entities that receive or benefit from federal financial assistance.[32] Under federal regulations, the status of a person or entity as a recipient applies to all programs, services or activities conducted by that person or entity, not to the specific program or programs to which the federal money is allocated.[33] This statutory interpretation is supported by a majority of court decisions,[34] exemplified by the New Jersey federal district court decision in *Poole v. South Plainfield Board of Education*.[35] In *Poole*, a student born with one kidney sought compensatory damages from the South Plainfield Board of Education citing the Board's decision denying him the right to participate in high school interscholastic wrestling because of his handicap.[36] The court held that the provisions of section 504 were applicable to the interscholastic athletic activities of a school system receiving federal funding even if none of the federal funds were specifically spent on interscholastic athletics.[37] The court deemed illogical that Congress would have intended to ban discrimination during school hours but not in the course of school-sponsored extracurricular activities.[38] The court based its position on the fact that federal aid to any program in a school system releases local money for other uses, thus benefitting those programs that are not direct beneficiaries of the federal aid.[39]

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32. 29 U.S.C. §794 (1976). The Office of Revenue Sharing, United States Department of Treasury Regulations provides that

> any entity which receives funds by grant, contract, or other arrangement for the purpose of providing a service the recipient government would otherwise provide . . . is a "secondary recipient."

See OFFICE OF REVENUE SHARING, UNITED STATES DEPARTMENT OF TREASURY REGULATIONS. The definition includes private nonprofit organizations that receive revenue sharing funds and use them in a manner that impacts on the citizens of the primary recipient government. *Id.* The Code of Federal Regulations defines a recipient as

> any state or its political subdivision, (or instrumentality thereof), any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended directly, or through another recipient including any successor, assignee or transferee of a recipient . . . .

33. 45 C.F.R. §84.3(f) (1980). For example, a program of a college history department itself receives none of the college's federal support. *See* FEDERAL PROGRAMS ADVISORY SERVICE, HANDICAPPED REQUIREMENTS HANDBOOK ¶ 305, at 1 (1980).

34. See note 27 *supra*.

35. 490 F. Supp. 948 (D.N.J. 1980).

36. *Id.* at 948.

37. *Id.* at 951. The court noted that it was clear from Title 45 of the Code of Federal Regulations Section 84.31 that the regulations of Section 84.37 of the Code, dealing with the right of a handicapped student to participate in the physical education and athletic activities of the school, are applicable to a recipient even though the funds received are not for the specific program involved in the handicapped person's claims. *Id.* The Code specifies: "In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient . . . may not discriminate on the basis of handicap." 45 C.F.R. §84.37(c)(1) (1980).

38. 490 F. Supp. at 951.

39. *Id.*

In addition, the D.H.H.S. Regulations implementing section 504 prohibit cities and other local political entities from perpetuating discrimination by providing "significant assistance" to any organization or person that discriminates on the basis of handicap.[40] A related provision also precludes any recipient from providing significant assistance to a community recreational group or social organization that discriminates against handicapped persons.[41] The latter regulation suggests that the following two criteria be applied to determine whether "significant assistance" has been provided:

> (1) The relationship between the recipient and the other entity including financial support, and (2) whether the other entity's activities relate so closely to the recipient's activity that they should fairly be considered the activities of the recipient itself.[42]

The holding of a Texas Federal District Court in *Doe v. Marshall*,[43] though it did not specifically refer to the significant assistance standard, is useful in determining when the "significant assistance" requirement will be met. In *Marshall*, the court held that a state high school athletic association policy that prohibited students from participating in varsity sports if their parents or guardians did not reside in the same school district, violated the requirement of section 504 that the school district evaluate individually the educational needs of each handicapped child.[44] Significantly, the court found that the delegation of rule-making authority from the school district to the private independent regulatory body would directly subject the latter to the section 504 individual evaluation requirement.[45] Although not made explicit in the text of the opinion, it appeared that the mere transfer of rule-making authority from the "recipient" school district to the private athletic commission was sufficient enough to be considered significant assistance.[46]

Road racing events conducted on public streets are subject to the nondiscrimination provisions of section 504 when a state, local political unit, private organization or person receives federal financial assistance and either conducts the race or provides significant assistance to the

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40. 45 C.F.R. §85.51(b)(1)(v) (1980).

41. *Id.* App. A, pt. 84, No. 6 (1980).

42. *Id.*

43. 459 F. Supp. 1190 (S.D. Tex. 1978).

44. *See id.* at 1191-92. The purpose of the high school policy was to prevent member high school athletic teams from recruiting student athletes from other school districts. The court found that the application of this school policy in the present case, where the plaintiff exhibited a need to live with his grandparents because of his psychological problems, would unlawfully conflict with the section 504 requirement that the educational needs of a handicapped student be assessed individually.

45. *See id.* at 1192.

46. *Id.* See notes 32-51 and accompanying text *supra*.

public or private entity conducting the race.[47] These standards will be applied to determine the applicability of section 504 to road racing in California.

California realizes a benefit from federal financial assistance in the form of federal aid for specific projects and in general assistance for welfare and other public expenditures.[48] In addition, California receives federal funding for highway construction and safety improvements under the Federal Aid Highway Act of 1970 and 1973,[49] the Highway Safety Acts of 1973[50] and the Urban Mass Transportation Act of 1964.[51] The majority of the funds allocated from the Treasury to the Federal Highway Commission under these specific federal programs are distributed to each state on the basis of total population[52] or of the ratio that the area of the state bears to the total area of all states.[53] California receives a large portion of this federal aid, which is earmarked for the specific purpose of highway construction and improvements.

In addition, California receives federal funding for welfare and other expenditures through the revenue-sharing provisions of fiscal assistance to state and local governments.[54] Congress has expressed its intent that these revenue-sharing funds be subject to the express congressional proviso that they not be used in a manner that subjects "persons" to discrimination: Section 1242 of the Revenue Sharing Act provides that, with regard to these funds,

> no person . . . shall . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity of a state government or unit of local government which receives funds under [this chapter].[55]

This section further specifies that section 504 shall also prohibit discrimination under any program or activity receiving revenue-sharing funds.[56] Thus, unless California and its political subdivisions can show

47. See notes 26-46 and accompanying text *supra*.
48. See note 54 and accompanying text *infra*.
49. 23 U.S.C. §§101-156 (1976).
50. *Id.* §§401-407 (1976).
51. 49 U.S.C. §§1601-1613 (1976).
52. Under the Federal Highway Safety Act, 75 percent of the available funds are allocated on the basis of population. *See* 23 U.S.C. §402(c) (1976). The Urban Mass Transportation Act allocates 85 percent of the available funds to urbanized areas with populations of 750,000 or more. *See* 49 U.S.C. §1604(b) (1976).
53. After selection of the specific projects that will receive assistance under the Federal Aid Highways Act, the remainder of the fund is distributed according to a formula which calculates the ratio of each state's area to the total area of all states, and the ratio of each state's rural population to the rural populations of all states. *See* 23 U.S.C. §104(b) (1976).
54. 31 U.S.C. §1221 (1976).
55. *Id.* §1242 (1976).
56. *Id.* The exact wording of the statute is as follows:
This section encompasses the prohibition of discrimination against otherwise qualified

by clear and convincing evidence that they do not receive revenue-sharing funds, they are subject to the provisions of sections 1242 and 504, prohibiting discrimination against qualified handicapped individuals by any recipient.[57] Any private entity that receives significant assistance from the recipient state is also subject to the prohibitions of section 504.[58]

Since California and its political subdivisions are clearly recipients of revenue-sharing funds and other forms of federal financial assistance, the inquiry turns to whether the scope of California's recipient status includes road racing conducted on public streets and whether significant assistance is provided to the entities that organize and conduct these events.

First, under *Poole*, the requirements of section 504 apply to road races conducted on public streets, although the state or local political unit only indirectly allocates to the race any funding, services, or property received from the federal government.[59] *Poole* dictates that California may not aid or perpetuate discrimination against qualified handicapped persons by providing significant assistance to race directors who discriminate against qualified wheelchair athletes.[60] Second, "significant assistance" by a recipient of federal funds to a nonrecipient is clearly established in the symbiotic relationship between the race directors and the cities in the operation of most road races. The Sacramento Marathon, which is typical of large-scale road races in its preparation planning,[61] is aided by the city police in providing traffic and crowd control and erecting barriers to restrain the flow of car traffic. The city fire department provides paramedics to aid those who need assistance during the race.

The foregoing are only a few of the circumstances that compel the conclusion that the activities of race directors and race committees can fairly be characterized as the activities of the cities themselves, thereby satisfying the significant assistance requirement of section 504. In *Marshall*, the use of the school facilities by the high school athletic regulatory body was sufficient to subject that private organization to the

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handicapped persons as provided in Section 504 of the Rehabilitation Act of 1973. . . . The statute shall apply where the state or local program is funded in whole or in part by subtitle A.

57. *Id.*

58. *See* 31 C.F.R. §51.51(i) (1980).

59. See notes 37-39 and accompanying text *supra*.

60. See notes 39-46 and accompanying text *supra*.

61. The Sacramento race organization is typical except insofar as the event has undergone changes in the original course to accomodate wheelchair participation. Telephone interview with John McIntosh, Race Director for Sacramento Marathon, October 10, 1981 (notes on file at the *Pacific Law Journal*).

requirements of section 504.[62] In the road race situation the use of public facilities, including streets, police and fire departments, is not the only manner in which the activities of the race organizers could be characterized as those of the city. Running events like the Sacramento Marathon are a convenient forum for inviting community involvement and participation on a wide scale. The running events attract out-of-town, and possibly out-of-state, participants and spectators, providing a direct benefit to cities in the form of increased tourism. The races also are conducive to the advertisement of various other city events and services. Moreover, they are a source of public education, in that many of the larger races conduct pre-race seminars on a variety of topics of interest to both runners and the general public, including running equipment, training techniques, and the benefits of cardio-vascular exercise to health and nutrition. In *Poole*, a recipient of federal funds was held subject to section 504 constraints even as to those programs for which federal funds were not specifically earmarked,[63] on the basis that all of the recipient's programs received a benefit, either directly or indirectly, from the funding.[64] Road races directly benefit state and local programs by providing a source of community recreation, socialization and public education. They are also an important source of revenue.[65] Public funds, including funds acquired by federal financial assistance, that would have been spent for the above purposes but for the popularity of local road races, are thereby diverted to other uses. Thus, even if cities or local political units do not allocate any part of their federal funds to locally conducted road races, the events are still subject to section 504 based on the significant assistance provided by the recipient city to the private race directors and the city's resulting ability to divert resources from city-operated public recreation to other programs.

2. What constitutes an otherwise qualified handicapped person?

The second requirement for liability under section 504 is that the individual complaining of discrimination be "qualified" to participate in the recipient's program. An "otherwise qualified handicapped person" is defined by federal regulations as "a handicapped person who meets the essential eligibility requirements" with respect to the services

62. *See* Doe v. Marshall, 459 F. Supp. 1190, 1192 (S.D. Tex. 1978).
63. *See* Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 951 (D.N.J. 1980).
64. *Id.* at 951.
65. In addition to providing an eager population of consumers for local supermarkets, restaurants, and running and clothing stores, running events are an important source of revenue for many charitable causes. One runner, Terry Fox, ran 3,339 miles across Canada with an artificial leg to raise $20 million for the Canadian Cancer Society. *See* Ferstle, *Warm Ups*, THE RUNNER, Sept. 1981, at 10.

offered by the recipient.[66] The United States Supreme Court defined the term in *Southeastern Community College v. Davis*,[67] stating that "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap."[68] In *Davis*, a woman who suffered from a serious hearing disability was denied admission to a registered nurse training program because of her hearing disability.[69] The Court found that a woman suffering from a serious hearing disability was not able to meet the legitimate requirements of a clinical nursing program.[70] Expert testimony revealed that the ability to understand speech without reliance on lipreading was necessary for a patient's safety during the clinical phase of the program.[71] The Court's conclusion hinged on an application of Title 45, section 84.3(k)(3), of the Code of Federal Regulations, which defines a qualified handicapped person with respect to postsecondary education programs as one meeting both "academic and technical standards."[72] The term "technical standards" includes "all nonacademic admissions criteria that are essential to participation in the program in question."[73] The Court interpreted this language as providing that a program may require applicants to possess physical qualifications necessary for participation in the program[74] for the Statute (504) does not require affirmative action to accomodate individuals who do not possess such qualifications.[75] In *Davis*, the nursing program would have been forced to alter significantly the structure of its programs to accomodate

66. 45 C.F.R. §84.3(k)(4) (1980).

67. 442 U.S. 397 (1979).

68. *Id.* at 406. The term "otherwise" was eliminated from the final Department of Health and Human Services (hereinafter referred to as D.H.H.S.) Agency Regulations because the Department believed that the deletion was necessary to comport with the intent of the statute: read literally, "otherwise" qualified handicapped persons could connote handicapped persons who are qualified *except* for their handicap, rather than *in spite of* their handicap. *See* 45 C.F.R. App. A, pt. 84, No. 5 (1980).

69. 442 U.S. at 402.

70. *Id.* at 413.

71. *Id.* at 403, 407. The District Court, in *Davis v. Southeastern Community College*, 424 F. Supp. 1341, 1343 (1976), found that in certain situations, such as in the operating room where the doctors wear masks, lipreading would be impossible and commands could not therefore be communicated between the respondent and the doctors. The circumstances underlying wheelchair participation in road racing do not encounter similar safety risks. The case of *New York Roadrunners Club v. Division of Human Rights* elicited only one instance of a collision between a runner and a wheelchair racer during the 1978 New York Marathon. The incident occurred when a foot racer, frightened by a spectator darting onto the race course, swerved into a wheelchair. The foot racer withdrew from the competition but did not seek medical attention. *See* Brief of Amicus Curiae at 27, New York Roadrunners Club v. Div. of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981).

72. 442 U.S. at 404, 406. *See* 45 C.F.R. App. A, pt. 84, No. 5 (1980).

73. 45 C.F.R. App. A, pt. 84, No. 5 (1980).

74. 442 U.S. at 406. The only physical qualification for competing in most locally conducted road races is the participant's certification that he or she is physically fit and has trained sufficiently for the distance of the race.

75. *Id.* at 411.

the hearing disabled plaintiff.[76] "*[F]undamental* alteration[s] in the nature" of a program to accommodate handicapped persons are not legally required.[77] Nevertheless, some failure of accomodation, not requiring "undue financial and administrative burdens," might be unreasonably discriminatory,[78] for there is a fine line between "a lawful refusal to extend affirmative action and illegal discrimination."[79] The *Davis* court specified that when "technological advances could be expected to enhance opportunities to rehabilitate the handicapped,"[80] and when attainment of these goals could be realized without imposing undue financial and administrative burdens on the recipient, it might be unreasonable discrimination to disallow participation.[81] The Court also noted that the possession of a handicap may not affect the individual's actual capacity in a particular context.[82] A person may possess certain limiting physical characteristics or mental impairment but negate those limitations with other abilities that would enable the individual to satisfy program requirements.[83] The Court thus concluded that possession of a handicap, in and of itself, could not be used as a justification for excluding handicapped participation.[84]

In the recent decision of *Pushkin v. Regents of the University of Colorado*,[85] a federal district court found, after examining the language of *Davis*, that when no particular physical qualification is *essential* to participation in a program, a handicapped person is otherwise qualified if the person is able to meet all of the requirements of the program despite the handicap.[86] In *Pushkin* a medical doctor, confined to a wheelchair because of multiple sclerosis, was denied admission to a psychiatric residency program because of his handicap.[87] The court

76. *Id.* at 407, 408. Indeed, the plaintiff suggested that she be given "individual supervision by faculty members whenever she attend[ed] patients directly," an exemption from taking certain required courses, and training so that she could "undertake all the tasks [that] a registered nurse is licensed to perform." *Id.* at 407-08.

77. 442 U.S. at 410 (emphasis added). The Court in *Davis* found that a program of study in registered nursing would have to undergo substantial alterations to accomodate a deaf student. *Id.*

78. *Id.*

79. *Id.* at 412.

80. *Id.* The accomplishments of wheelchair athletes in road racing have translated into design changes in the chairs themselves to make them lighter and more stable for road racing. *See* POSITION PAPER, *supra* note 7, at 1.

81. 442 U.S. at 410.

82. *Id.* at 405, 406 n.6. In fact, individuals "regarded as having an impairment may at present have no actual incapacity at all." *Id.* at 406.

83. *Id.* at 406. This is the case in wheelchair road racing, where the only significant difference between the wheelchair racers and their able-bodied counterparts is in the mode of negotiating the race course.

84. *Id.* at 405.

85. 504 F. Supp. 1292 (D. Colo. 1981).

86. *Id.* at 1298.

87. *Id.* at 1299. Multiple sclerosis is medically defined as a disease and legislatively defined as a severe handicap. *See* 29 U.S.C. §706(13) (1976).

found that the doctor's physical limitations would not have required *substantial* modifications in the residency program, and that he was, therefore, discriminated against solely by reason of his handicap.[88] The court in *Pushkin* noted that adjustments that had been previously implemented in the residency program for other handicapped applicants could readily accomodate the plaintiff and that further modifications could easily be made:[89]

> Adjustments that have been made for other handicapped residents include placing the resident on part-time load and extending the residency term, adjusting patient load, modifying curriculum schedules, reducing night call duty, placing at nearby rather than distant hospitals for duty, allowing wheelchair use. . . .[90]

The *Pushkin* court found that, based on the plaintiff's demonstration of his ability to deal with patients in the clinical setting and his satisfactory completion of the "objective" admissions criteria, he was otherwise qualified despite his handicap.[91]

In summary, a handicapped person is qualified to participate in a recipient's program if the disabled individual fulfills the essential qualifications, including physical qualifications, of the program.[92] Thus, a handicapping condition, in and of itself, will not preclude a handicapped person from participating in a recipient's program if, because of the handicapped person's other abilities, or those abilities coupled with technological advances, the handicapped person could participate in the recipient's program without requiring "fundamental" alterations in the program.[93] The next section will discuss the degree to which a recipient's program must be made accessible to a qualified handicapped person short of requiring "fundamental" alterations. In particular, it will be illustrated that program accessibility in road racing can be achieved without requiring "fundamental" alterations in the nature of the event. In addition, it will be shown that providing separate compe-

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88. 504 F. Supp. at 1295.

89. *Id.*

90. *Id.*

91. *Id.* at 1298-99. A handicapped person must satisfy both the "academic" and "technical" standards of a recipient postsecondary education program to be eligible to participate in that program. The term "technical standards" refers to all nonacademic admissions criteria including subjective criteria of evaluation. *See* 45 C.F.R. App. A, pt. 84, No. 5 (1980). The *Davis* court interpreted the H.E.W. provision to include legitimate physical qualifications among those nonacademic admissions criteria that are essential to the particular program. *See* Southeastern Community College v. Davis, 442 U.S. 397, 407 (1979). Yet in the absence of articulated standards upon which a subjective assessment can be made of an applicant's ability to fulfill the essential requirements of a program, the subjective assessment cannot be used to disqualify the applicant. *See* 504 F. Supp. at 1298.

92. See notes 66-91 and accompanying text *supra*.

93. See notes 79-91 and accompanying text *supra*.

titions for wheelchair competitors violates the program accessibility requirement.

3. Program Accessibility as the Key to Section 504 Compliance

The Supreme Court in *Davis* did not attempt to standardize the situations in which a recipient's refusal to undergo modifications of program standards to accomodate a handicapped person would constitute discrimination; indeed, this would have been contrary to the expressed intent of Congress that each recipient examine its own program and make the program "in its entirety, . . . readily accessible to handicapped persons."[94] A *general* requirement of accessibility is, however, stated in the Code of Federal Regulations:

> No qualified handicapped person shall, because a recipient's facilities are *inaccessible to* or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity . . . .[95]

A recipient is not required to make each program or service accessible to qualified handicapped persons if its program *as a whole* is accessible.[96] Program accessibility requires that handicapped individuals be given an equal opportunity to achieve equal results as nonhandicapped persons.[97] These general requirements are extended to physical education and athletic programs offered by federally funded education programs:

> In providing physical education courses and athletics and similar programs and activities to any of its students, a recipient . . . may not discriminate on the basis of handicap . . . . A recipient that offers physical education courses or that sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.[98]

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94. 45 C.F.R. §§84.21-84.23 (1980) (general program accessibility requirements). Federal regulations under Section 504 require each recipient to maintain on file a self-evaluation of all of its programs and activities. *See* HANDBOOK, *supra* note 33 at ¶ 101 at 2. In addition, employers must provide "reasonable accomodation" to handicapped employees, taking into account the "known physical or mental limitations of an otherwise qualified handicapped applicant, unless the recipient can demonstrate that the accomodation would impose an undue hardship on the operation of its program." *See* 45 C.F.R. §84.12(a) (1980).

95. 45 C.F.R. §84.21 (1980) (emphasis added).

96. *Id.* §84.22(a).

97. *Id.* §§85.51(b)(1)(ii), (iii).

98. *Id.* §§84.37(c)(1), 84.47(a)(1). The fact that the Code of Federal Regulations mentions only athletics and nonacademic extracurricular activities in those subparts dealing with federally funded education does not imply that a recipient who is not an educational institution need not abide by the general program accessibility standard. The specification of athletic activities with regard to education is indicative of the realization by the D.H.H.S. of the importance of athletic and extracurricular activities in the educational setting, and in the students' socialization process. The courts too have recognized the importance of athletics in an individual's development. *See, e.g.*, Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 952-54 (D.N.J. 1980); Doe v. Marshall, 459 F. Supp. 1190, 1191-92 (S.D. Tex. 1978).

In addition, federal regulations provide that priority shall be given "to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate."[99] Thus, separate services shall not be used unless necessary to afford handicapped individuals equally effective benefits.[100] The D.H.H.S. Regulations also provide that, despite the existence of separate or different programs or activities, a qualified handicapped person may not be denied the equal opportunity to participate in programs that are not separate or different.[101] In sum, the regulations adopted by the D.H.H.S. require that a recipient's program be accessible,[102] offer equal participation in equally effective programs,[103] and allow individuals to participate in programs that are not separate or different, but are subject to only those modifications or adjustments that are required to ensure full participation.[104]

Under the general accessibility standard of section 504, a recipient's programs must be accessible to handicapped persons who meet the essential eligibility requirements of the recipient's program despite their handicaps.[105] As discussed above, an additional requirement of program accessibility is that these programs or services be offered in the most appropriate integrated setting.[106] *Davis* limits this general requirement only to the extent that a recipient need not undergo *substantial* modifications or fundamental alterations in its program, or incur undue financial and administrative burdens in achieving program accessibility.[107]

Under *Davis*, the exclusion of wheelchair athletes from participation in road racing would constitute *unreasonable* discrimination.[108] Wheelchair road racers are qualified to compete in road racing despite their handicap. For example, the requirements for entering the Sacramento Marathon are limited to: (1) completing the entry form, (2) paying the required fee on time, (3) being over 12 years of age, (4) certifying one's physical fitness and sufficient training to complete the distance, and (5) verifying this medical condition through a doctor's statement.[109] The fitness criterion is not a bar, in that wheelchair athletes

99. 45 C.F.R. §84.22(b) (1980).
100. *Id.* § 85.51(b)(1) (iv).
101. *Id.* §84.4(3). The Code of Federal Regulations (Title 45, Sections 84.37(c)(2) and 84.47(a)(2) (1980)) provides that a recipient may offer separate athletic activities for students only if "no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different."
102. 45 C.F.R. §84.22(a) (1980).
103. *Id.* §§85.51(b)(1)(ii), (iii).
104. *See generally id.* §85.51 (1980) (general prohibitions against discrimination).
105. See notes 66-92 and accompanying text *supra*.
106. 45 C.F.R. §84.22(b) (1980).
107. See notes 67-84 and accompanying text *supra*.
108. See notes 75-93 and accompanying text *supra*.
109. Not every runner receives a physical before the race. Those that desire a physician's

who compete in road racing events put in comparable training to that of their able-bodied counterparts in preparation for road racing events.[110] Furthermore, these road races could easily be made accessible to wheelchair competitors without requiring substantial modification of the event, and without incurring undue financial or administrative burdens. Many wheelchair racers have competed safely in numerous long and short distance road running events.[111] Because accessibility is not a problem in road racing conducted on paved streets, no substantial modifications would be necessary to accomodate wheelchairs in that instance.[112] Any accomodations sought by wheelchair athletes would be consistent with the interests of foot runners themselves, who desire obstacle-free race courses in the interest of faster times and lesser chance of injury.

In addition to the general requirement of accessibility of a recipient's program to qualified handicapped persons is the requirement that the recipient achieve this program accessibility "in the most integrated setting appropriate."[113] Conducting separate events for wheelchair and able-bodied participants would violate this and other provisions of section 504 for several reasons. For instance, separate races would not afford qualified handicapped persons an "equal opportunity" to achieve equal results.[114] One of the major benefits provided by road

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treatment for injury, or general advice on whether they are physically capable of completing the race, may seek a doctor's verification. Under the rules promulgated by the N.W.A.A., each wheelchair athlete would be required to have a general medical examination for his or her own protection in order to compete safely. All wheelchair participants in the National Wheelchair Games, for example, must have obtained medical permission to participate within two months of the competition. *See* THE NATIONAL WHEELCHAIR ATHLETIC ASSOCIATION CONSTITUTION AND RULES, §C-1.0, at 7 (1975) [hereinafter cited as N.W.A.A. RULES].

110. See note 10 *supra*. The Mayor of New York, Edward I. Koch, made the following statement on the issue of the inclusion of wheelchair competitors in the 1978 New York City Marathon:

> It is important to note that an emerging, exceptionally qualified, class of wheelchair competitors is active in the United States today. The vigorous training and resultant ability of these athletes, including both women and men, are equal to that of world-class footrunners, both at home and abroad.

See Press Release, *supra* note 13.

111. See note 71 and accompanying text *infra*. The I.W.A.A. has approximately 100 members. Canada also has a large number of wheelchair road racers, and the President of the I.W.A.A., Phil Carpenter, stated that he "recently was contacted by individuals in Nigeria interested in wheelchair road racing." The Orange Bowl Marathon in Florida had over fifty wheelchair participants in 1981 and will have an expected 100 or more in 1982. *See* Phone Conversation with Phil Carpenter, *supra* note 22.

112. The program accessibility standard might require the placement of ramps so that wheelchair participants would have a smoother ride over curbs. The wheelchair athletes, however, do not advocate that all cross-country races be accessible. There are certain races conducted on rugged terrain inaccessible to wheelchairs, for which exclusion of wheelchair participation would not be unreasonable. Telephone interview with Dino Wallen, Vice President of the California Wheelchair Athletic Association, January 7, 1982 (notes on file at the *Pacific Law Journal*).

113. 45 C.F.R. §84.22(b) (1980).

114. *Id.* §§85.51(b)(1)(ii), (iii). Competitive athletic events for able-bodied and wheelchair athletes can take any one of three forms: segregated, parallel and mainstreamed. There are very few athletic events that permit the wheelchair athlete and the non-disabled athlete to compete

racing, to both the competitors and the general public, is an atmosphere of community involvement. The level of community involvement would necessarily be diminished if separate races were held involving only the disabled community. In addition, providing separate treatment would "demean the ability or social status of the affected class,"[115] thus "substantially impairing the accomplishment of the objectives of the activity with respect to handicapped persons."[116] Moreover, the operation of separate events, would be a needless and senseless extravagance in that twice the resources would be required to conduct the races. Wheelchair road racers themselves contend that separately conducted races are undesirable.[117] They do not envision racing against the runners for the purpose of competitive placement, but "merely wish to use the activity and integrate into it."[118] The use of segregated races, in any case, would be contrary to the regulation issued by the D.H.H.S. that only those modifications necessary to achieve equally effective benefits should be instituted by recipients.[119] In addition, the regulations provide that qualified handicapped persons may not be denied the opportunity to participate in integrated programs, despite the existence of separate or different programs.[120] Finally, the denial of equal access by qualified wheelchair participants to road racing events would be contrary to the stated purpose of section 504 of providing equal benefits in the most integrated setting appropriate.[121]

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against one another on an equal basis (mainstreamed). One such event is archery, the second may be table tennis, and the third is the bench press in weightlifting. Segregated events are those in which everyone must be either standing or sitting in a wheelchair to permit equitable competition; these include, e.g., basketball, football, softball, track and field. A parallel event is one in which wheelchair athletes and standing athletes participate simultaneously, or practically so. In a parallel event, however, wheelchair athletes compete only against wheelchair athletes and non-disabled athletes compete only against non-disabled athletes for purposes of placement. Road racing is easily conducted as a parallel event. *See* POSITION PAPER, *supra* note 7, at 2-3.

115. Parham v. Hughes, 441 U.S. 347, 354 (1979).

116. 45 C.F.R. §85.51(b)(1)(3) (1980).

> A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration . . . (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program with respect to handicapped persons . . . .

Id.

117. See note 114 *supra*. The position of the N.W.A.A. is that road racing should be conducted in a parallel fashion. *Id.*

118. *See* Phone Conversation with Phil Carpenter, note 22 *supra*.

119. *See* 45 C.F.R. §85.51(b)(1)(ii) (1980); *id.* App. A, pt. 84, No. 6.

120. *Id.* §85.51(b)(2).

121. *See id.* §§84.22(b), 85.51(b)(1)(ii), (iii). Indeed the policy of Congress is to mainstream handicapped individuals into the community environment:

> It is essential that recommendations be made to assure that all individuals with handicaps are able to live their lives independently and with dignity, and that complete integration of all individuals with handicaps into normal community living, working and service patterns be held as the final objective.

White House Conference on Handicapped Individuals Act, Pub. L. No. 93-516, §301, 88 STAT. 1631 (1974).

This comment thus far has shown the essential requirements for imposing section 504 liability are that (1) the program or activity "receive federal financial assistance,"[122] (2) the handicapped person be qualified to participate in that program[123] and (3) the program be conducted in the "most integrated setting appropriate."[124] These criteria are implicated by the exclusion of wheelchair competitors from road racing. When "significant assistance" is provided by a recipient to a person or entity that does not directly receive federal funding, the requirement of "receiving federal financial assistance" is satisfied as to both parties.[125] Wheelchair athletes are "qualified" to participate in these events despite their handicaps, for they meet the essential criteria for participation and do not require substantial modifications in the race format.[126] Additionally, separate races would not afford the wheelchair athletes equal benefits as non-disabled athletes.[127] Next, this comment will examine the available remedies for a section 504 violation, and determine whether they would adequately serve the interests of the wheelchair athletes.

B. The Available Remedies for a Section 504 Violation

Section 504 provides an administrative procedure for cessation of federal funding when a program recipient violates the terms of the statute,[128] but does not explicitly provide a remedy for the infringement of individual rights.[129] In interpreting section 504 in *Southeastern Community College v. Davis*,[130] the United States Supreme Court did not decide whether a private right of action[131] was available, or whether the sole remedy provided for a section 504 violation was an administrative cessation of funding to the discriminating program.[132]

The Ninth Circuit Court of Appeals in *Kling v. County of Los Angeles*,[133] however has held that a private right of action exists under section 504 and that administrative remedies need not be exhausted before the private action may be brought.[134] The *Kling* court, following the rationale of the Seventh Circuit set forth in *Lloyd v. Regional Transpor-*

122. See notes 26-65 and accompanying text *supra*.
123. See notes 67-93 and accompanying text *supra*.
124. See notes 99-121 and accompanying text *supra*.
125. See note 37 and accompanying text *supra*.
126. See notes 109-110 and accompanying text *supra*.
127. See notes 97-104 and accompanying text *supra*.
128. *See* 29 U.S.C. §794a(2) (1976 & Supp. 1978).
129. *See* Kling v. County of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980).
130. 442 U.S. 397 (1979).
131. *Id.* at 404, 405 n.5.
132. *Id.* at 412-13.
133. 633 F.2d 876 (9th Cir. 1980).
134. *Id.* at 878-79.

tation Authority,[135] held that a private right of action existed under section 504 by analogizing to the United States Supreme Court decisions that found the existence of a private action under the comparable provisions of Titles VI and IX.[136] The *Lloyd* opinion used the four factors set forth by the United States Supreme Court in *Cort v. Ash*,[137] under which a private remedy was impliedly created by statute when; (1) the plaintiff is a member of a special class for whose benefit the statute was created, (2) the legislative intent was to create a private remedy, (3) the implied remedy is consistent with the legislative scheme, and (4) the cause of action is not relegated to state law, or encompassed by an area that is basically the concern of the states, where it would be inappropriate to infer a cause of action based solely on federal law.[138] Applying the factors to section 504, the *Lloyd* court found that the plaintiffs, as handicapped persons, were among the special class for whose benefit the statute was enacted.[139] The legislative intent of section 504 was next interpreted and applied in the same manner as the United States Supreme Court decisions affecting Title VI, including the right to bring a private action.[140] The implied remedy was found to be consistent with the purpose of the legislative scheme in that the stated purpose of section 504 was to enforce statutory and regulatory standards.[141] Finally, the cause of action was interpreted to concern the enforcement of federally created rights and thus would not be the kind of suit traditionally relegated to state law;[142] Congress intended to deal

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135. 548 F.2d 1277 (7th Cir. 1977).

136. *Id.* at 1285-87. Section 601 of the Civil Rights Act of 1964 provides that

> No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. §2000d (1976). Title IX of the Education Amendments Act of 1972 further requires that

> no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. §1681 (1976). Subsequent to the *Lloyd* opinion, Congress enacted a provision making available to "any person aggrieved" by a Section 504 violation the "remedies, procedures and rights set forth in title VI." *See* 29 U.S.C. §794a(2) (1976).

137. 422 U.S. 66 (1975).

138. *Id.* at 78. The United States Supreme Court, in *Lau v. Nichols*, 414 U.S. 563 (1974), used the *Cort* factors to determine that Congress intended to create a private right of action under Title VI, even though the statute didn't expressly create the right. 422 U.S. at 78.

139. 548 F.2d at 1285.

140. *Id.* at 1285-86. The *Lloyd* interpretation is consistent with the report from the Senate Labor and Public Welfare Committee that stated that the purpose of Section 504 was to "provide for administrative consistency . . . ease of implementation, and permit a judicial remedy through a private action." 120 CONG. REC. 30534 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 6373, 6391.

141. 548 F.2d at 1286. The fact that Congress closely aligned Section 504 with Titles VI and IX is indicative that the language was chosen for the purpose of creating a private right of action. *Id.*

142. *Id.* at 1286-87.

with the particular needs of handicapped individuals[143] on a national level.[144] The court, therefore, concluded that, because all four of the *Cort* factors were satisfied, section 504 provided a private right of action.[145]

Part of the rationale for the *Lloyd* finding of a private right of action was the lack of an *effective* administrative remedy, as an alternative means of enforcing section 504.[146] Since *Lloyd*, Congress has amended section 504 to provide expressly that the "administrative remedies, procedures and rights" available under Title VI are also applicable to section 504.[147] Notwithstanding this legislative enactment, the administrative remedies available to aggrieved persons under section 504 remain inadequate.[148] The purpose of the administrative remedies under section 504 was to provide government agencies with a forum to initiate proceedings to terminate funding for noncompliance,[149] and were not meant to provide an effective remedy for individual violations.[150]

As has been shown,[151] although section 504 does not expressly provide a private right of action, Congress has implied that this remedy

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143. One area of concern to Congress is the lack of adequate means of public transportation for the handicapped. See note 166 *infra*.

144. 548 F.2d at 1286-87.

145. *Id.* at 1287. The majority of courts have found a private right of action under Section 504. *See, e.g.*, Kling v. County of Los Angeles, 633 F.2d 876 (9th Cir. 1980); Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); Leary v. Crapsey, 566 F.2d 863 (2d Cir. 1977); Whitaker v. Board of Higher Education, 461 F. Supp. 99 (E.D.N.Y. 1978); Barnes v. Converse College, 436 F. Supp. 635 (D.S.C. 1977).

146. 548 F.2d at 1286-87.

147. See note 140 *supra*.

148. The D.H.H.S. filed an amicus brief in *Whitaker v. Board of Higher Education*, 461 F. Supp. 99 (E.D.N.Y. 1978), stating that exhaustion of administrative remedies should not be required before a judicial remedy could be sought. *See* 4 MENTAL DISABILITY L. REP. 86, 87 (1980). The inadequacy of an administrative remedy for enforcement of a section 504 violation was also an issue in the *Kling* decision. The court found support for the arguments against requiring exhaustion of administrative remedies in the United States Supreme Court decision of *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The *Cannon* Court held that, under the comparable provisions of Title IX, exhaustion of administrative remedies was not required before an individual could file a private action because the administrative remedies "did not afford individual complainants adequate relief." *See id.* at 706-08, n.41.

In *Kling v. County of Los Angeles*, 633 F.2d 876 (1980), the court reasoned that since Congress incorporated the administrative remedies of Title VI into section 504 having known of the *Cannon* decision, and that the remedies for Title VI and Title IX violations are the same, Congress must have intended that the *Cannon* decision apply to section 504. *See id.* at 878. The inadequacy of the administrative remedy as a method of enforcing individual rights under civil rights statutes is evident if one examines the fact that under the comparable provisions of Title IX to date, not one educational institution has been denied one dollar, although 600 schools have been cited for noncompliance. *See* H. APPENZELLER & T. APPENZELLER, SPORTS AND THE COURTS 89 (1981).

149. *See* 548 F.2d at 1286-87.

150. There is an extensive delay between the original filing of a section 504 complaint and the actual termination of funding for a section 504 violation. The Secretary of the D.H.H.S. must file a full report with the House and Senate legislative committees having jurisdiction over the program accused of a violation. *See* 45 C.F.R. §84.61 (1980) (adopting the administrative procedures for enforcement of Title VI, 45 C.F.R. §§80.6-80.10 (1980)).

151. See notes 128-150 and accompanying text *supra*.

will be available. This implication is confirmed by the fact that section 504 satisfies the four-part test for a private right of action set forth in the United States Supreme Court decision in *Cort v. Ash*.[152] In addition, it is unnecessary that individual plaintiffs exhaust the available administrative remedies before bringing a private right of action in California.[153]

The attainment of a judicial remedy through a private right of action will not, however, adequately protect the interests of the wheelchair athletes seeking access to road racing events. At present it is uncertain that the courts will be consistent in their application of the provisions of section 504 to road racing. Whether wheelchair athletes are "qualified" to participate in road racing events is a matter on which courts may differ. Some courts also may decline to extend the definition of a recipient of "federal financial assistance" to this form of activity. Moreover, compelling the right to participation through the court process would be contrary to the desire of the wheelchair athletes to establish a working rapport with race directors.

In the previous sections it was shown that the federal statute section 504 requires "recipients" of federal financial assistance to provide an equal opportunity for disabled individuals "to obtain equal results, gain the same benefit, or to reach the same level of achievement" as non-disabled individuals and to have those results achieved in an integrated setting.[154] The provisions of section 504 would require race directors to provide wheelchair athletes with an opportunity to participate in road races that are not separate or different from those provided to non-disabled individuals.[155] This comment will next discuss an alternative means of guaranteeing equal access to road races. With this in mind, the right to participate under the equal protection clause of the federal constitution will be analyzed.

Federal Equal Protection and the Right to Participate

Recent United States Supreme Court decisions have extended federal equal protection guarantees to prohibit state-enforced racial discrimination in the use of public recreational facilities.[156] Moreover, it is the perspective of the federal courts that the fourteenth amendment guaranty of the right to life, liberty and property is not reserved to healthy able-bodied children and adults, but applies with even more

152. 422 U.S. 66 (1975).
153. *See* Kling v. County of Los Angeles, 633 F.2d 876, 878 (9th Cir. 1980).
154. 45 C.F.R. §§84.22(b), 85.51(b)(1)(ii) (1980).
155. *Id.* §85.51(b)(2) (1980).
156. *See, e.g.*, Palmer v. Thompson, 403 U.S. 217 (1971); New Orleans v. Barthe, 376 U.S. 189 (1964); Watson v. City of Memphis, 373 U.S. 526 (1963).

vigor to the physically handicapped.[157] This judicial attitude lays a foundation for the recognition of a right of participation in road racing by individuals with physical disabilities. In order to establish whether the fourteenth amendment guarantees the right to participate, certain prerequisites must be met. Whether the preclusion of qualified wheelchair athletes from competing in road races conducted on public streets constitutes a violation of the federal equal protection clause hinges on two principal concerns, the existence of identifiable state action and identification of the appropriate standard of review of state action denying wheelchair participation in road races.

A. State Action: Finding a "Nexus"

The decisions of the United States Supreme Court suggest that private persons and entities may be deemed state actors if the relationship between the private entity and the public entity is such that the actions of the private entity could be characterized as those of the state.[158] The Court will find this relationship when there is a sufficiently close nexus between the state and the challenged action of the private entity.[159] The degree of interdependence required to satisfy the "sufficiently close nexus" standard was characterized by Justice Clark in *Burton v. Wilmington Park Authority*[160] as a *position of interdependence* between private and public actors akin to a joint venture, whereby the government agency would be equally responsible for the discriminatory choices of the private actor.[161] In addition, the Court has resolved that the state need not have expressly authorized the activities of its officials or representatives, in that the state's failure to protect its citizens from infringements of their constitutional rights also constitutes "state action".[162]

Persuasive arguments are made that state tolerance of private discrimination in the use of public facilities also implies a violation of the equal protection clause.[163] Justice Goldberg stated in *Bell v. Maryland*[164] that a right of access to places of public accomodation had been recognized as a common law liberty that could not be denied by the

157. *See* Halderman v. Pennhurst State School and Hosp., 446 F. Supp. 1295, 1318-22 (E.D. Pa. 1977).

158. *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974); Gilmore v. City of Montgomery, 417 U.S. 556, 569 (1974) (quoting Norwood v. Harrison, 413 U.S. 455, 466 (1973)); Griffin v. Maryland, 378 U.S. 130, 135 (1969).

159. 419 U.S. at 351.

160. 365 U.S. 715 (1961).

161. *Id.* at 725.

162. *See* Home Tel. & Tel. Co. v. City of Los Angeles, 227 U.S. 278, 287 (1973); United States v. Cruikshank, 92 U.S. 542, 555 (1875). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1148-61 (1978) [hereinafter cited as TRIBE].

163. *See* Bell v. Maryland, 378 U.S. 226, 297 n.17, 298 (1964); TRIBE, *supra* note 162, at 1152.

164. 378 U.S. 226 (1964).

failure of the state to protect the right against private action which discriminates against certain classes of individuals with respect to using the public facilities.[165] Congress in drafting the fourteenth amendment assumed that it would include the common law liberties among those rights afforded equal protection.[166] Thus, government tolerance of private action that discriminates against certain classes of individuals in the right of access to public facilities could be considered unlawful state action.[167]

In addition to recognizing an equal protection right of access to public facilities, including recreational facilities, the courts also have recognized a right of participation in professional and interscholastic athletics.[168] The Eighth Circuit Court of Appeals in *Brenden v. Independent School District*[169] held that a Minnesota high school league, a private voluntary nonprofit organization, violated the equal protection clause of the fourteenth amendment by implementing a rule that precluded girls from participating with boys in noncontact interscholastic athletics.[170] The court found state action in the "tremendous public interest in educational functions"[171] and that the public school machinery of the state was involved in the ultimate enforcement of the discriminatory rule.[172]

Under the standards enunciated by the United States Supreme Court, it is apparent that a "sufficiently close nexus" exists between the activities of the race director and the city or local political entity such that the activities of the race director are fairly considered to be state action. This relationship is empirically established by the relationship between city government and the private entities that sponsor running races, a relationship that is properly characterized as one of interdependence and joint venture. The normal course of events in a road race is for the city to provide police officers for traffic and crowd control, including the erection of barriers to block traffic. Frequently, the running event itself is co-sponsored by the local parks and recreation departments. Additionally, both parties receive the monetary benefit of

165. *See id.* at 286; TRIBE, *supra* note 162, at 1152-53.
166. 378 U.S. at 286; TRIBE, *supra* note 162, at 1152-53.
167. *See* TRIBE, *supra* note 162, at 1154.
168. *See, e.g.*, Leffel v. Wisconsin Interscholastic Athletic Ass'n, 444 F. Supp. 1117, 1122 (E.D. Wis. 1978) *quoting* Brown v. Board of Educ., 347 U.S. 483 (1954); Dorsey v. State Athletic Comm'n, 168 F. Supp. 149, 152-53 (E.D. La. 1958), *aff'd*, 359 U.S. 533 (1959).
169. 477 F.2d 1292 (8th Cir. 1973).
170. *Id.* at 1300.
171. *Id.* at 1295. Additionally, the Court found that the plaintiff had standing to assert her claim because the "plaintiffs' interest in participating in interscholastic sports is . . . substantial and cognizable. . . . Thus, th[e] case is properly before a federal court." *Id.* at 1299.
172. *Id.* at 1299. *See also McDonald v. NCAA*, 370 F. Supp. 625, 631 (C.D. Cal. 1974), holding that voluntary concurrence of the state or instrumentality of a state in a decision of a private organization constitutes state action.

the revenue generated by the consumer running population.[173] The Sacramento Marathon, like a great many locally conducted road races, is organized and conducted by a private sports shop. The advertisement that the sport shop receives for conducting the race is extensive; for instance, T-shirts are issued to competitors with the name of the sports shop printed on the back. These races involve multiple elements of the community in a common enterprise that benefits the city in the form of increased community fellowship. For example, these races usually have aid stations staffed by volunteers from the community that provide runners with water and other forms of support. Not only do the runners participate in the races but families and well wishers also take part. Public officials also are known to make frequent appearances at these running events.

The situation in publicly conducted road racing is analogous to *Brenden*[174] in that "tremendous public interest" is generated in their support, and the use of city facilities is necessary to conduct the events. One of the reasons why there is a great deal of public support for these road races is due to the fact that a large portion of the entry fees generated by these events is donated to public and private charities.[175]

State action might also be found in the failure of local government to take action to prevent discrimination in the use of public facilities.[176] The standard for determining whether inaction by the state in alleviating private discrimination amounts to discriminatory state action is whether the action of the state would "demonstrate a significant tendency to facilitate, reinforce, and support private discrimination."[177] This relationship is apparent in the conduct of cities and private race directors. Locally conducted road races require the use of city streets, the support of the local police and fire departments, and prior city approval. In addition, government failure to prohibit discrimination against the handicapped in road races constitutes state action as implied support of the infringement of the recognized common law right of access to places of public accomodation.[178]

Thus, the activities of private race directors in discriminating against qualified wheelchair athletes can fairly be characterized as state action because of the position of interdependence between the race directors

173. See note 65 *supra*.

174. Brenden v. Independent School Dist., 477 F.2d 1291 (8th Cir. 1973).

175. In Sacramento alone in 1981 the charitable causes for which races were sponsored, included to name but a few; an effort to end the killing of baby harp seals by Arctic poachers; the reconstruction of a local hospital, and cancer research.

176. See notes 163-167 and accompanying text *supra*.

177. *See* Norwood v. Harrison, 413 U.S. 455, 466 (1973).

178. See notes 163-167 and accompanying text *supra*.

and the city. Next, it is necessary to determine the appropriate level of equal protection scrutiny to be applied to state action that discriminates against handicapped individuals.

B. The Physically Disabled as a "Suspect" Class

Under the traditional equal protection analysis, laws that treat persons similarly situated differently are presumptively valid if they bear some rational relationship to a legitimate state objective.[179] No presumption of validity attaches to classifications based on criteria that have been regarded as inherently suspect by the courts.[180] Classifications based on criteria considered suspect can withstand an equal protection challenge only if the classification is necessary to further a compelling state interest,[181] and the state interest cannot be achieved by less drastic or less restrictive means.[182]

The characterization of the handicapped, including the physically disabled, as a suspect class for purposes of equal protection review hinges on whether these characteristics align with the recognized "traditional" characteristics of suspect classifications. In *San Antonio Independent School District v. Rodriguez*,[183] the United States Supreme Court outlined those characteristics considered to be "traditional indicia" of suspectness:

> [S]uch disabilities, or . . . such a history of purposeful unequal treatment, or . . . such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[184]

These indicia of suspectness clearly apply to the handicapped person.[185] Virtually all handicapping conditions are disabilities by definition,[186] which, in addition to the physical, emotional or mental

179. Parham v. Hughes, 441 U.S. 347, 351 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio Indep. School Dist. v. Rodriquez, 411 U.S. 1, 60 (1973) (Stewart, J., concurring).

180. 441 U.S. at 351; *see* 427 U.S. at 312; 411 U.S. at 60 (Stewart, J., concurring).

181. *See* 411 U.S. at 17; 427 U.S. at 312.

182. Shelton v. Tucker, 364 U.S. 479, 488 (1960); Dean Milk Co. v. City of Madison, 340 U.S. 349, 354 (1951); *see* Kuhn v. Shevin, 416 U.S. 351, 357-58 (1974) (Brennan, J., dissenting).

183. 411 U.S. 1 (1973).

184. *Id.* at 28.

185. Although the term "handicapped" can imply a wide variety of physical, mental and emotional afflictions, it is proper to treat handicapped persons as a single class for purposes of legal analysis because of the legal consequences that result from society labeling certain traits as "handicaps". *See* Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 SANTA CLARA L. REV. 855, 858 n.21 (1975) [hereinafter cited as Burgdorf]. In addition, the physically disabled have been treated as a separate class: through the use of such separate facilities as schools and rehabilitation institutes, they have been encouraged to interact only with others of the same class. *See Symposium on the Rights of the Handicapped*, 50 TEMP. L.Q. 941, 946 (1977) [hereinafter cited as *Symposium*].

186. See note 17 *supra*.

impairment, include those disabilities legally and socially imposed.[187] Moreover, physical disabilities qualify as, in the parlance of the United States Supreme Court, "immutable characteristic[s]," as are race, national origin, sex, and other characteristics "determined solely by accident of birth."[188] Statutory distinctions based on immutable characteristics often relegate a class to inferior status without regard to the actual capabilities of its individual members.[189] Historically, the handicapped have been treated unequally by the normal members of society. Handicapped persons have been segregated from the rest of society both physically, in the form of separate education[190] and institutionalization,[191] and socially, because of societal prejudices concerning the ability and behavior of handicapped persons.[192] These patterns of discrimination have extended into employment,[193] transportation[194] and the right to receive life-saving medical treatment.[195]

Handicapped persons may properly be characterized as a "discrete and insular minority,"[196] in that they have systematically been denied

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187. *See generally* Burgdorf, *supra* note 185, at 857-59.

188. *See* Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

189. *Id.*

190. Indeed many handicapped individuals have been completely excluded from receiving an education. In 1972, some observers estimated that there were one million handicapped individuals of school age in the country who were totally excluded from public education programs. *See* Burgdorf, *supra* note 185, at 869 n.96. Congress has taken additional steps to provide education to all handicapped children with the passage of the Education for the Handicapped Act of 1974, §611, 20 U.S.C. §1401 (1976).

191. *See* Burgdorf, *supra* note 185, at 887. "A description of the physical plan of a modern day average institution for the retarded reveals that these facilities are little more than prisons." *See* Burgdorf, *supra* note 185, at 890.

192. Segregation of the physically disabled from the rest of society

> has provoked and perpetuated a reaction among nonhandicapped persons that the handicapped are inferior . . . . [N]o opportunity is provided for the disabled to rebut this belief by demonstrating their actual capacities. The non-handicapped are able to minimize contact with the handicapped and reduce tensions frequently caused by such encounters.

Symposium, supra note 185, at 947. The uneasiness that a nonhandicapped person feels in the presence of the handicapped springs from ignorance and a lack of contact with the handicapped. Once the handicapped are integrated into social settings, the fear and discrimination surrounding them will decrease. *See* B. WRIGHT, PHYSICAL DISABILITY—A PSYCHOLOGICAL APPROACH 254-65 (1960).

193. *See* Burgdorf, *supra* note 185, at 864. In 1975, it was estimated that only one-third of blind persons of working age in this country had jobs. Burgdorf, *supra* note 185, at 864.

194. Judge Sorkin of New York, himself a handicapped person, described the plight of the physically handicapped in transportation as follows:

> The physically handicapped are de facto barred from using the city's subways and to an only slighter degree from the city's surface transportation system. They are not merely relegated to the back of the bus, they are totally excluded.

Sorkin, *Equal Access to Equal Justice: A Civil Right for the Physically Handicapped*, 78 CASE & COMMENT 41, 41 (1973).

195. The New York Times estimated that unnecessary deaths of handicapped babies due to the withholding of life-saving treatment number in the thousands each year. *See* N.Y. TIMES, June 12, 1974, at 18, col. 4.

196. The famous footnote four of *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938) (emphasis added) indicated that it need not inquire into

> [W]hether *prejudice* against discrete and insular minorities may be a special condition,

access to the majoritarian political process.[197] Handicapped persons have difficulty reaching even the first stage in having their voices heard in the political process because of physical and statutory barriers to the casting of their ballots. Official neglect in the choice of polling places may effectively prevent handicapped persons from voting because of architectural barriers or the inability of these persons to obtain transportation to and from the voting places.[198] In addition, most states have laws that deny mentally ill persons the right to vote.[199] Based on this pattern of societal discrimination, handicapped persons are properly characterizable as a "suspect class."[200] Handicapped individuals are saddled with disabilities that exceed those encountered by racial minorities,[201] and are far less politically powerful than most racial minorities.[202] Any classification that intentionally discriminates against handicapped individuals as a class should require a suspect level of equal protection scrutiny. Because it is conceivable, given the present reluctance of the United States Supreme Court to recognize new personal rights,[203] that the Court will not apply "suspect criteria" to classifications based on handicap, this comment will also discuss the

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which tends to seriously curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

John Ely suggests that the key to understanding the Supreme Court decisions finding particular groups of individuals to have "suspect" class characteristics is the examination of whether the group has been subject to societal *prejudice*. *See* J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135-83 (1980) [hereinafter referred to as ELY]. Ely suggests that the Court is primarily concerned with unconstitutional motivation in its review of state legislation under the equal protection clause. Indeed, the purpose behind requiring that legislation affecting suspect classes be "closely tailored to the object of the statute" and serve a substantial state interest is to flush out unconstitutional motivations. Ely notes that prejudice has much to do with unconstitutional motivations regarding treatment of particular classes of individuals. Therefore, closer judicial scrutiny should be given to classifications affecting groups that have been subject to a history of social prejudice to identify potentially unconstitutional motivations behind the legal classifications. *See* ELY, *supra* at 135-83. Handicapped persons have been subject to a great deal of societal prejudice. The concept of survival of the fittest, created by the Social Darwinists, has fostered contempt and hostility toward the handicapped person, with the result that sterilization was rationalized as being in the interests of the individual. *See* Burgdorf, *supra* note 185, at 887.

197. Most mentally handicapped persons are denied the right to vote by express provisions in state constitutions and statutes. *See* Burgdorf, *supra* note 185, at 906.

198. Burgdorf, *supra* note 185, at 906-07.

199. Burgdorf, *supra* note 185, at 906.

200. Judicial recognition of the handicapped as a suspect class has been isolated; the North Dakota Supreme Court in *In re G.H.*, 218 N.W.2d 441 (N.D. 1976), however, expressed confidence that classifications based on the "immutable characteristics" of the handicapped would have been considered suspect by the *Rodriguez* Court. *Id.* at 446. The application of the criteria of suspectness to classifications based on handicap has been the subject of strong, well-reasoned commentary. *See* Burgdorf, *supra* note 185, 855-910; Krass, *The Right to Public Education for Handicapped Children: A Primer for the New Advocate*, 1976 U. ILL. L.F. 1016, 1037-42 (1976); Comment, *Jury Selection: The Courts, The Constitution, and the Deaf*, 11 PAC. L.J. 967, 982-88 (1980).

201. See notes 190-195 and accompanying text *supra*.

202. See notes 196-199 and accompanying text *supra*.

203. *See* Massachusett's Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (Marshall, J., dissenting).

alternative application of lesser standards of review to classifications based on handicap.

C. Lesser Standards of Review

The United States Supreme Court decisions concerning classifications based on gender and illegitimacy indicate that individuals having certain group characteristics are entitled to more "sensitive," or a heightened level of, equal protection scrutiny.[204]

Classifications based on these "sensitive" characteristics must serve important governmental interests and be substantially related to those interests.[205] Classifications based on handicap will accordingly be examined to determine if characteristics attributable to the handicapped properly fall within the purview of heightened level scrutiny. The implication from the recent United States Supreme Court decisions of *Weber v. Aetna Casualty & Surety Co.*[206] and *Frontiero v. Richardson*[207] is that classifications based on *immutable characteristics* are "sensitive" and require more exacting scrutiny than that provided under the traditional rational basis test.[208]

The Court's position is based in part on the recognition that classifications based on traits such as race, gender and illegitimacy "frequently [bear] no relation to ability to perform or contribute to society."[209] In addition, classifications disfavoring racial minorities and women have been considered suspect because they "will be perceived as a stigma of inferiority."[210]

The Court of Appeals in *Brenden*[211] applied a heightened standard of review, requiring a Minnesota high school league to show that its exclusion of qualified high school girls from participating with boys in noncontact sports was substantially related to an important state interest.[212] Recognizing that the class of women, like the class of men, in-

204. See note 208 *infra*.

205. *See* Reed v. Reed, 404 U.S. 71, 76-77, 92 (1971).

206. 406 U.S. 164 (1972).

207. 411 U.S. 677 (1973).

208. *See* Medora v. Colautti, 602 F.2d 1149, 1154 (3d Cir. 1979). The Court of Appeals in *Medora* characterized the standard of review under "sensitive but not suspect" classifications as requiring at least rational basis scrutiny that is close and substantial. *Id.* at 1154, 1155 n.12. The case dealt with a regulation of the Pennsylvania Department of Public Welfare under which the blind, aged or disabled could be declared ineligible for state assistance if they did not qualify for federal assistance, a requirement that non-disabled individuals did not have to meet. *Id.* at 1150-52. The regulation was held to violate the federal equal protection clause. *Id.* at 1155.

209. 411 U.S. at 686.

210. *Id. See also* Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 19, 485 P.2d 529, 540, 95 Cal. Rptr. 329, 340 (1971); *Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065, 1127 (1969).

211. Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973).

212. Id. at 1302. The court justified its application of the heightened level of review on the United States Supreme Court decision of *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), which applied the standard to gender-based classifications.

cludes individuals with widely different athletic abilities, the court held that a state may not use outdated stereotypic assumptions about the nature of females as a class to deny females an individualized determination of their qualifications for a benefit provided by the state.[213]

Congress has manifested increased sensitivity to classifications based on race,[214] sex,[215] and handicap.[216] Arguably, Congress has thereby expressed its intention to place discriminatory practices against the handicapped on the same level of concern as those affecting race and gender.[217] Further evidence that classifications based on handicap may be subject to the same equal protection standards of review as those based on race or gender is found in the United States Supreme Court decision of *Regents of the University of California v. Bakke*.[218] In *Bakke*, Justice Brennan concurred with the majority that

> Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution.[219]

1. Applying a Heightened Level of Scrutiny to the Handicapped

Handicapped individuals clearly meet the standards enunciated by the United States Supreme Court in determining "sensitive" classifications. Present societal notions of the abilities of handicapped persons are largely based on outdated beliefs about the effect of a disability on the ability to perform a given task.[220] In *Poole v. South Plainfield Board of Education*,[221] the court explicitly rejected a school board argument that risk of injury to the plaintiff was a sufficient justification to disal-

213. 477 F.2d at 1300.
214. *See* 42 U.S.C. §§2000d, 2000e (1976).
215. *See* 20 U.S.C. §1681; 42 U.S.C. §2000e (1976).
216. 29 U.S.C. §794 (1976).
217. Section 504 had its genesis in an abortive attempt by Congressman Vanik to include the handicapped within the strictures of the Civil Rights Act of 1964. *See* Lloyd v. Regional Transp. Auth., 548 F.2d 1277, 1280 n.9 (7th Cir. 1977). The following excerpt from Joseph A. Califano's Preamble to the Section 504 Regulations, further identifies the similarities between section 504 and Title's VI and IX:

> the language of 504 is almost identical to the comparable non-discrimination provisions of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. It establishes a mandate to bring handicapped persons into the mainstream of American life.

See FEDERAL PROGRAMS ADVISORY SERVICE, HANDICAPPED REQUIREMENTS HANDBOOK, App. IIIB at 1:i (1980).
218. 438 U.S. 265 (1978).
219. *Id.* at 340.
220. Brenden v. Independent School Dist., 477 F.2d 1292, 1300 (8th Cir. 1973).
221. Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948 (D.N.J. 1980).

low his participation.[222] The court maintained that it was this type of paternalism that section 504 was designed to prevent.[223] In addition, the court found that the stigma associated with persons who are handicapped may "generate a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[224]

Classifications based on handicap contain those essential characteristics of sensitive classifications that require the state to justify the classification with a substantial state interest. Handicapping conditions are "immutable" and frequently bear no relation to an individual's ability to function in a particular context. This is especially the case in wheelchair road racing when the individuals involved train diligently to meet the physical demands of road racing. Congress also has expressed its intent that discrimination against the handicapped be given judicial scrutiny of the same magnitude afforded classifications based on gender and illegitimacy.

2. The Rational Basis Standard

Even if the United States Supreme Court holds true to its recent line of decisions granting state legislatures a great deal of deference in the area of social legislation,[225] thus maintaining its static posture in the recognition of new areas of personal rights,[226] any classification must still rationally relate to a legitimate government objective.[227] A classification excluding wheelchair athletes from participating in road races would fail even the minimum standard rational basis test.

The *Brenden*[228] court, in evaluating a high school league's interests in excluding female participation on male teams in non-contact interscholastic athletics, found that the league had failed to show a "sufficient rational basis for [its] conclusion that women are incapable of competing with men in non-contact sports."[229] The court stated that the class of women, like the class of men, includes individuals of widely differing

222. *Id.* at 953-54.
223. *Id.*
224. Brown v. Board of Educ., 347 U.S. 483-94 (1954). A person whose condition need not be a substantial impediment may become "handicapped" through societal labeling of a personal characteristic as a handicap. Educators and psychologists use the term "self-fulfilling prophecy" to describe a process whereby persons assigned stigmatizing labels tend to conform to the expectation created by the labels. *See* Burgdorf, *supra* note 185, at 858.
225. *See* San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 55 (1973); Kelso, *Justice O'Connor Replaces Justice Stewart: What Effect on Constitutional Cases?* 13 PAC. L.J. 259, 260 (1982).
226. See note 175 *supra*.
227. *See* Johnson v. Robison, 415 U.S. 361, 374-75 (1974).
228. Brenden v. Independent School Dist., 477 F.2d 1292 (8th Cir. 1973).
229. *Id.* at 1300.

abilities, and that the league had failed to show any objective non-discriminatory standards for evaluating individual qualifications for non-contact interscholastic athletics.[230] The *Brenden* rationale is equally applicable to the exclusion of wheelchair athletes from road racing, which presents an analogous factual situation. The requirements for entering a road race do not contain any objective criteria that would justify the exclusion of wheelchair competitors from road races. Standard entry forms simply require that the participant certify that he or she is fit and able to complete the race;[231] neither of these requirements would exclude qualified wheelchair athletes from participation.[232]

A race director has two legitimate goals in organizing a race: to provide competition that is challenging and satisfying to a broad range of athletes of varying abilities, and to ensure that the competition takes place under safe and orderly conditions. Exclusion of wheelchair athletes is not rationally related to either of these goals.

In the larger road races,[233] race directors meet their first objective by separating individuals according to running ability at the starting line through the use of staggered starts. Either the better runners are started at the starting line, and the other runners behind them, or the runners are separated into groups based on each runner's average pace per mile, or both. Similarly, the use of staggered starts has been employed effectively in those events in which wheelchair participation has been allowed. The wheelchair competitors are given anywhere from a one- to fifteen-minute head start, depending on the number of runners, the number of wheelchair participants, the length of the course, and the nature of the terrain.[234] Through the use of staggered starts any crowding at the start because of runners or wheelchairs trying to avoid other runners or wheelchairs is eliminated. By the time the runners catch up with the chairs, if they do, the wheelchair participants are sufficiently spread out that no obstacle is presented to the runners; this ensures that the runners' times will not be impeded by having to slow down and change direction for a wheelchair.[235]

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230. *Id.*

231. See note 109 and accompanying text *supra*.

232. See notes 107-109 and accompanying text *supra*.

233. Examples are the New York, Boston, Orange Bowl (Florida) and Sacramento Marathons.

234. Telephone Interview with Dino Wallen, Vice President of the C.W.A.A., Jan. 7, 1982 (notes on file at the *Pacific Law Journal*) [hereinafter referred to as Phone Conversation with Dino Wallen].

235. The wheelchair road racing population as a whole also abides by certain "rules of the road" which are emphasized by the I.W.R.A. and the C.W.A.A. One such rule is that wheelchair participants stay to the far left-hand side of the road because runners usually run on the right-hand side, though the entire street is fair game. In addition, wheelchair participants are to call out "wheelchair" about 30-35 feet from a runner to alert the runner as to the wheelchair's presence, and as to which side the chair will pass the runner on. Another rule of the road is that wheelchair

The race director's second major interest, that of ensuring safe competition, is also consistent with wheelchair participation. The record to date indicates that wheelchair participation in road racing has not resulted in a significant safety threat to either wheelchair participants or their ambulatory counterparts.[236] Indeed, the likelihood of a runner being struck by a car on the race course is greater than that of colliding with a wheelchair.[237] Moreover, wheelchair participants are at least as cautious as runners in avoiding collisions with runners and other obstacles because of the greater risk of injury in being thrown from a wheelchair.[238]

In sum, the total exclusion of wheelchair participation in road racing would be *unreasonable* discrimination under the fourteenth amendment, in that a race director's legitimate goals in maintaining a safe and competitive race are not reasonably promoted by this exclusion. Judicial enforcement of the right to participate on a case-by-case basis, however, is an inadequate means of protecting the rights of wheelchair participants, as inconsistent decisions would undoubtedly result.[239] Grounds for differing judicial opinion may arise on the relative degree of public participation in the form of state or local assistance that is necessary to implicate the "state action" requirement for these activities to be scrutinized under the equal protection clause.[240] The appropriate standard of scrutiny under the federal and state equal protection clauses concerning classifications based on handicap would differ among the states according to the varying interpretations of relevant state constitutional guarantees.

The wheelchair athletes seek a timely and concerted effort by race directors to ensure their harmonious participation with the able-bodied runners.[241] Inconsistent judicial resolution of the rights of wheelchair

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participants are to give the right of way to runners. *See* Phone Conversation with Dino Wallen, note 234 *supra*.

236. See note 71 *supra*. Another incident occurred after the completion of a different race when a runner stopped immediately after crossing the finish line, contrary to normal safe procedure (these collisions will occur even between runners when the finish line area is not kept clear). *See* Brief of Amicus Curiae at 27, New York Roadrunners Club v. Division of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981) (filed by Richard Raymond, Attorney for the I.W.R.A.) (copy on file at the *Pacific Law Journal*).

237. *See* Phone Conversation with Phil Carpenter, note 22 *supra*. Cars are often given a lane of travel on race courses, a practice which on numerous occasions has resulted in collisions between runners and automobiles. Marathons and other road races are subject to inevitable safety hazards such as weather, road conditions, the inexperience of other runners, and even an occasional dog attack of a participant. *See* Brief of Amicus Curiae at 27, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981) (filed by Richard Raymond, Attorney for the I.W.R.A.) (notes on file at the *Pacific Law Journal*).

238. *See* Phone Conversation with Dino Wallen, note 234 *supra*.

239. See text accompanying note 154 *supra*.

240. See notes 158-167 and accompanying text *supra*.

241. *See* POSITION PAPER, *supra* note 7, at 2-3; Phone conversation with Phil Carpenter, note 22 *supra*.

athletes could inhibit these efforts by race directors because of uncertainty about appropriate methods of integration, or concerning whether integration is required at all.

The right of wheelchair athletes to participate in locally conducted road races is supported by section 504 of the Rehabilitation Act of 1973 and the fourteenth amendment. This comment will next turn to whether any additional protection of the wheelchair athlete's right to participate in road racing is provided by California law.

IDENTIFYING A RIGHT TO PARTICIPATE UNDER CALIFORNIA LAW

The analysis of the wheelchair athlete's right to participate in road racing under California law will focus on rights conferred on handicapped persons by California statutory and constitutional law. Specifically, this section will analyze Civil Code sections 54 and 54.1 and the equal protection guarantee of the California Constitution.

A. The Application of Civil Code Sections 54 and 54.1

1. Guaranteeing a Public Right of Access

California has assured all handicapped persons a specific right of access to public streets, walkways and highways, and to all places where the general public is invited.[242] Civil Code Section 54 provides that

> . . . visually handicapped persons, and other physically disabled persons shall have the same right as the able-bodied to the full and free use of the streets, highways, sidewalks, walkways, . . . public facilities, and other public places.[243]

In addition, Civil Code Section 54.1 states that

> . . . physically disabled persons shall be entitled to full and equal access, as other members of the general public, to . . . places of public accomodation, amusement or resort, and other places to which the general public is invited, subject only to the conditions and limitations established by law . . . .[244]

Whether these statutes can be interpreted to extend to discrimination against handicapped persons in road racing events depends on whether the legislative meaning attached to the word "public place" is broad enough to include road races conducted on public streets to which the general public is invited. The California cases interpreting the intent of the legislature in this respect have given a *broad* construction to the

242. *See* CAL. CIV. CODE §§54, 54.1.
243. *Id.* §54.
244. *Id.* §54.1.

term "public place."[245] In *Gardner v. Vic Tanny Compton, Inc.*,[246] the California Second District Court of Appeal determined that a facility is considered "public" if it is *open to common use*.[247] In *Askew v. Parker*,[248] a private pool owner was held to have made a public use of the pool, subjecting it to state health inspection laws, by inviting all teenage children in the community to use the pool free of charge.[249] The *Askew* court noted that the meaning of the term "public" varied with the subject to which it was applied, interpreting the term broadly when it involves matters threatening health or public safety.[250]

Although the New York Court of Appeals in *New York Roadrunners Club v. Division of Human Rights*[251] disagreed with the State Human Rights Appeal Board that the race director had engaged in unlawful discrimination by excluding wheelchair participation in the New York Marathon, the court did find that a marathon course was a "place of public accomodation" within the meaning of the New York statute.[252]

The California Supreme Court decision of *Marsh v. Edwards Theatres Circuit, Inc.*[253] is the leading California case interpreting the statutory requirements for nondiscrimination in places of public accomodation. The court initially noted that the "federal anti-discrimination statutes prohibiting discrimination on the basis of race, color, religion or national origin in places of public accomodation are no broader in application" than are California statutes; thus, a plaintiff who pleads a violation of the federal civil rights statute will not prevail if the claim of discrimination in a place of public accomodation is not supported by California law.[254] The plaintiff in *Marsh*, a quadraplegic

245. *See* Gardner v. Vic Tanny Compton, Inc., 182 Cal. App. 2d 506, 510-12, 6 Cal. Rptr. 490, 493-95 (1960); Askew v. Parker, 151 Cal. App. 2d 759, 762, 312 P.2d 342, 344 (1957).

246. 182 Cal. App. 2d 506, 6 Cal. Rptr. 490.

247. *Id.* at 510-12, 6 Cal. Rptr. at 493-95.

248. 151 Cal. App. 2d at 759, 312 P.2d at 342.

249. *Id.* at 762-63, 312 P.2d at 344-45.

250. *Id.*

251. *See* New York Roadrunner's Club v. Division of Human Rights, 81 A.D.2d 519, 437 N.Y.S.2d 681 (1981).

252. 81 A.D.2d 519 at 519; N.Y. EXEC. LAW §292(9). Specifically the statute states that

> The opportunity to . . . the use of places of public accomodation . . . without discrimination because of race, creed, color or national origin . . . is hereby . . . declared to be a civil right. *See* N.Y. EXEC. LAW §291(2).

The term "place of public accomodation, resort or amusement" includes "race courses, skating rinks, amusement and recreation parks . . . ." *Id.* §292(9).

253. 64 Cal. App. 3d 881, 134 Cal. Rptr. 844 (1976).

254. *Id.* at 885, 134 Cal. Rptr. at 846. The federal statute reads, "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accomodations of any place of public accomodation . . . ." 42 U.S.C. §2000a (1976). Federal statutory jurisdiction is invoked by the operation of a place of public accomodation "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." *Id.* §2000a(b). Operations affect commerce if the "customarily present . . . athletic . . . exhibitions, or other sources of entertainment . . . move in commerce." *Id.* §2000a(c). The United States Supreme Court has held that under the meaning of the statute, "other places of entertainment

confined to a wheelchair, commenced an action against a private theater owner alleging that the latter's refusal to allow him to remain in his wheelchair in the theater aisle unlawfully discriminated against him under the California civil rights statutes.[255] The defendant's justification for his refusal, accepted by the court, was that since fire regulations do not permit anyone to sit in the aisles,[256] discrimination in this context was not unreasonable.[257] Therefore, under *Marsh*, though a private theater was held to be a place of public accomodation, handicapped persons could be excluded when the interests of public safety and health were at stake.

2. Wheelchair Participation under Civil Code Sections 54 and 54.1

Under the broad construction given the meaning of the word "public place" by the California courts,[258] the eventual recognition that marathon courses are "places to which the general public is invited" seems likely for several reasons. Ordinarily, no restrictions are placed on participation in road races by members of the general public. In addition, that these races are run on public streets, and that police officers are necessary to direct the flow of traffic for the protection of participants, suggest that road racing is a "public" activity under Civil Code Section 54.1. There is no countervailing state law, as was the case in *Marsh*, that would permit exclusion of wheelchair participation.[259] Even the existence of such a countervailing law would not mitigate the protection by Civil Code Section 54 of the right of handicapped persons to "full and free access to *public places*."[260] Exclusion of wheelchair participation from road racing open to the public would thus violate the terms of Civil Code Sections 54 and 54.1, and would subject the offender to misdemeanor liability.[261] At present, however, there is no guarantee that the courts will construe Civil Code Sections 54 and 54.1

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includes direct participation in some sport or activity" and that Congress intended that the word "place of entertainment" be interpreted broadly according to its generally accepted meaning. *See* Daniel v. Paul, 395 U.S. 298, 306 (1969). The statute, by its terms, would apply to either or both large-scale annual running events that draw runners from out of state and events that advertise in running magazines intending to attract out-of-state runners. 64 Cal. App. 3d at 885, 134 Cal. Rptr. at 846.

255. 64 Cal. App. 3d at 884, 134 Cal. Rptr. at 846. The plaintiff claimed that Civil Code Section 51, prohibiting discrimination in business establishments, should have applied to his case. The court denied this contention, stating that the provisions of Civil Code Sections 54 and 54.1 were his exclusive remedy. *Id.* at 889, 134 Cal. Rptr. at 849.

256. *Id.* at 886, 134 Cal. Rptr. at 847.

257. *Id.* at 891, 134 Cal. Rptr. at 850.

258. See notes 245-250 and accompanying text *supra*.

259. See note 256 and accompanying text *supra*.

260. CAL. CIV. CODE §54.

261. *See id.* §54.3. Any person or entity who interferes with the right of access of a physically disabled person to public facilities or places under Civil Code Sections 54 and 54.1 is liable for any actual damages incurred by the plaintiff and up to $1,000 in punitive damages. *Id.*

to apply to road races conducted on public streets. Litigation of the interests of wheelchair athletes under present California statutes therefore remains subject to the same disadvantages cited earlier:[262] a lack of standardized procedures and inconsistent holdings, that would leave race directors uncertain as to the most appropriate method of integration. The recognition of a right of participation by statute is preferable to judicial interpretation of existing statutory and constitutional guarantees as a means of ensuring effective wheelchair participation.

Although the existing language of Civil Code Sections 54 and 54.1 limits the degree to which they can provide a reliable means of wheelchair participation in road racing, this shortcoming could be remedied by amending these sections to provide standardized procedures for participation. Specific guidelines for wheelchair participation will subsequently be recommended for legislative incorporation into the existing Civil Code sections.

Having found that a statutory recognition of the right of participation under the California Civil Code would be appropriate, this comment will next examine equal protection under the California Constitution. This will determine whether the scope of the constitutional guaranty would extend to participation by handicapped persons in athletic events that are held open to the general public.

B. The Equal Protection Guaranty of the Right to Participate Under California Law

Article 1, section 7, of the California Constitution provides that "a person may not be . . . denied equal protection of the laws."[263] While the California Supreme Court has generally followed the United States Supreme Court in its equal protection analysis,[264] it has occasionally recognized "suspect" classifications and "fundamental" rights when the High Court has not.[265]

The California Supreme Court in *Sail'er Inn, Inc. v. Kirby*[266] held that classifications based on gender are inherently suspect, *particularly* when those classifications are made with respect to fundamental inter-

262. See notes 154, 158-167 and accompanying text *supra*.

263. CAL. CONST. art. 1, §7.

264. *See* Serrano v. Priest, 5 Cal. 3d 584, 596 n.11, 487 P.2d 1241, 1249 n.11, 96 Cal. Rptr. 601, 609 n.11 (1971).

265. *See, e.g.*, 5 Cal. 3d at 584, 487 P.2d at 1241, 96 Cal. Rptr. at 601 (education a fundamental right); Sail'er Inn v. Kirby, 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971) (sex a "suspect" classification). *Cf.* Stanton v. Stanton, 421 U.S. 7 (1975) (sex not accorded "suspect" classification treatment); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973) (education not a fundamental right).

266. 5 Cal. 3d 584, 485 P.2d 529, 95 Cal. Rptr. 329.

ests.[267] The court described suspect classifications as those based on immutable traits: characteristics that are usually fortuitous by circumstances of birth, often bearing no relation to ability to perform or contribute to society.[268] A second factor used by the court in determining "suspectness" was whether the classification carried with it the "stigma of inferiority and second class citizenship."[269]

Additionally, the California Constitution guarantees individuals certain inalienable rights that "are not dependent on those guaranteed by the Constitution of the United States";[270] among those rights are "enjoying and defending life and liberty, . . . and pursuing and obtaining . . . happiness."[271] Specifically, the California Legislature has granted to individuals with developmental disabilities the "right to social interaction and participation in community activities" and "a right to physical exercise and recreational opportunities."[272]

Handicapped individuals certainly are characterized by those traits identified by the California Supreme Court as indicative of the identifiable traits that confer "suspect" status on a group. Physical disabilities and other handicapping conditions are immutable characteristics, as they comprise a status into which the class members are often "locked by the accident of birth"[273] and are often unrelated to the actual ability of those individuals to contribute to society. The ongoing denial to handicapped individuals of the opportunity to become productive members of society[274] and the continued reinforcement of the stereotype of handicapped individuals as inferior will only serve to imprint further in their minds the futility of trying to improve themselves.

California recognizes that suspect classifications made with respect to fundamental interests are especially deserving of strict scrutiny. Arguably, the freedom to pursue a happier and more healthful existence through participation in athletics could be considered a fundamental interest in California; the importance accorded the right of handicapped individuals to participate in community activities and engage in physical exercise is manifested by the legislative codification of these important interests.[275] A classification prohibiting handicapped per-

267. *Id.* at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341.
268. *Id.* at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.
269. *Id.* at 19, 485 P.2d at 540, 95 Cal. Rptr. at 341.
270. CAL. CONST., art. I, §24.
271. *Id.* art. I, §1.
272. *See* CAL. WELF. & INST. CODE §§4502(f), (g).
273. 5 Cal. 3d at 18, 485 P.2d at 540, 95 Cal. Rptr. at 340.
274. One scholar has summarized the current practices resulting from discrimination as the unwillingness to grant the disabled "normal" social interaction that would allow them to become integrated into the "normal" society. *See generally* C. SAFILIOS-ROTHSCHILD, THE SOCIOLOGY AND SOCIAL PSYCHOLOGY OF DISABILITY AND REHABILITATION 4 (1970).
275. See notes 270-272 and accompanying text *supra*.

sons from participating in road racing thereby limits the exercise of a fundamental right by a class of individuals having the characteristics of a suspect class; this exclusion would be improper, absent a compelling state interest. Enforcement of the right to participate under the California equal protection clause would be subject, however, to the same uncertainties and inconsistencies as would be experienced in attempting to enforce participation on a case-by-case basis under the federal equal protection clause.

CONCLUSION

This comment has shown that existing state and federal constitutional and statutory law entitle qualified wheelchair athletes to participate in running events conducted on public streets. First, section 504 of the Federal Rehabilitation Act of 1973 applies to all road races on public streets conducted by private race directors with the permission and assistance of state agencies receiving federal funding. Accordingly, under the provisions of section 504, qualified wheelchair athletes must be allowed to participate in any such race, when this participation does not require substantial modification of the event.

Second, exclusion of wheelchair athletes from these events would violate both federal and state equal protection clauses. Last, the provisions of Civil Code Sections 54 and 54.1 prohibiting discrimination against handicapped persons in the use of "streets, walkways . . . and other places to which the general public is invited"[276] should be interpreted to include running events conducted on public streets to which the general public is invited to participate.

These laws do not, however, serve to protect adequately the wheelchair athlete's right of participation. Attempting to achieve integrated participation in road racing through the judicial enforcement of existing statutory and equal protection guarantees would result in the inconsistent application of existing legal doctrine. A case-by-case adjudicative approach to seeking legal guarantees of the wheelchair athlete's right to participate in road racing would also inhibit the ability of race directors and wheelchair athletes to establish standardized procedures for the safe and effective integration of wheelchair participants. Alternatively, amending California Civil Code Sections 54 and 54.1 to specifically include road racing conducted on public streets as a place "to which the general public is invited" would ensure that the right to participate will be recognized by race directors, and would promote

276. CAL. CIV. CODE §§54, 54.1.

important policy concerns of the California legislature regarding the physically disabled.

The availability to the wheelchair athlete of locally conducted running events presents an invaluable opportunity to California to mitigate the present lack of organized athletic events for the physically disabled.[277] In addition, the legal recognition of a right of participation would promote the federal and state policy of mainstreaming disabled individuals into normal community settings.[278] Community attitudes toward the disabled would be favorably altered, and the awkwardness that able-bodied members of society feel toward the physically disabled would diminish because of increased awareness of the physical capabilities of the disabled individual.

In addition to amending Civil Code Sections 54 and 54.1 to specifically recognize a right of participation by wheelchair athletes in running events conducted on public streets, the following guidelines for participation should also be incorporated into these Civil Code sections. Prior to issuing a race permit to a race director, the public entity responsible for issuing the permit should ascertain that the race director has consulted with the local chapter of the National Wheelchair Athletic Association to determine if wheelchair participation in the event would be feasible. In addition, the "Race Director Guidelines for Participation"[279] promulgated by the International Wheelchair Roadracers Association should be adopted by the legislature as the standard guidelines for ensuring safe and effective wheelchair participation in road racing. These guidelines are the culmination of years of experience gained from actual participation by wheelchair athletes in road racing, and accurately reflect the necessary standards for safe participation. As an added qualification, the race director should be required to provide, and the wheelchair athletes required to submit to, a safety inspection of their chairs by a person qualified to conduct this sort of inspection.

The recognition by the California Legislature and the courts that section 504 of the Rehabilitation Act of 1973, Civil Code Sections 54 and 54.1 and the equal protection clauses of the state and federal constitutions prohibit discrimination against qualified wheelchair athletes in running events conducted on public streets would properly reflect and

277. See note 10 *supra*.

278. Both state and federal governments now pursue the goal of total integration of handicapped persons into the mainstream of society. The California Legislature declares that "[i]t is the policy of this state to encourage and enable disabled persons to participate fully in the social and economic life of the state . . . ." *See* CAL. GOV'T CODE §19230a; *In re* Marriage of Carney, 24 Cal. 3d 725, 740, 598 P.2d 36, 44, 157 Cal. Rptr. 383, 391 (1979).

279. *See* Race Director Guidelines for Participation (Jan. 21, 1982) (unpublished guidelines from the I.W.R.A.).

apply the philosophy and scope of those laws, but would produce uncertain results. Alternatively amending Civil Code Sections 54 and 54.1 to include running events conducted on public streets as "public places," where discrimination against the handicapped will not be tolerated, will: (1) further the interests served by these statutes, by providing handicapped individuals with equal access to places where the general public is invited; (2) promote the legislative goal of mainstreaming the handicapped into the community setting; and (3) provide an opportunity for the physically disabled to achieve a sense of satisfaction and self-worth through athletic participation.

David D. Carico